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The only case quoted to us which is exactly in point is the case of *Durga Prasanna Ghose* v. *Kali Das Dutt* (1). The same point was raised in that case, and the opinion expressed is that which we now entertain. The other case quoted, namely *Batai Ahir* v. *Bhuggobutty Koer* (2), and the two cases *Ram Monee Mohurer* v. *Aleemoodeen* (3) and *Raj Kishen Mookerjee* v. *Pearee Mohun Mookerjee* (4) cited therein, and followed by that decision, proceed on entirely different grounds. The plaintiffs in these cases were admittedly proprietors of the lands and, as such, were entitled to exercise all the ordinary rights of ownership; and it was held in all these cases that the defendants who disputed the landlord's right to collect rents from the tenants directly, on the ground that they held intermediately, were bound to establish their title. As the plaintiff has failed to prove that the defendant holds under an incumbrance voidable under s. 66 of the Rent Act, the suits have been properly dismissed. We accordingly dismiss these appeals with costs.

P. O'K. *Appeals dismissed.*

Before Mr. Justice Field and Mr. Justice Macpherson.

KALI KISHEN TAGORE (PLAINTIFF) *v.* GOLAM ALI (DEFENDANT.)*

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Landlord and tenant—Notice to quit—Declaratory decree—Specific Relief Act—Transfer of Property Act (IV of 1882), s. 42—Discretion of Court to give a declaratory decree—Tenant setting up larger interest than he is entitled to.

A plaintiff, admitting a defendant's right to a *kursa-jama* tenure in certain lands, but denying a permanent *malguzari* tenure set up by him, sought to eject the defendant from the *kursa-jama* holding, and for a declaration that the defendant was not entitled to the permanent *malguzari* tenure: *Held*, that the plaintiff was entitled to the declaration asked for, notwithstanding that in consequence of his failure to prove a reasonable notice to quit, he was unable to obtain a decree for ejectment.

A Judge, interfering with the discretion exercised by a lower Court in granting a declaratory decree, should state his reasons for so doing.

The principle laid down in *Vivian v. Moat* (5) is not applicable to this country.

* Appeal from Appellate Decree No. 329 of 1885, against the decree of H. Beveridge, Esq., Judge of Furridpore, dated the 19th of December 1884, reversing the decree of Baboo Jagat Durlubh Mozoomdar, Subordinate Judge of Furridpore, dated the 22nd of December 1883.

(1) 9 C. L. R., 449.
(2) 11 C. L. R., 476.
(3) 20 W. R., 374.
(4) 20 W. R., 421.
(5) L. R. 16 Ch. D., 730.

Before Mr. Justice McDonell and Mr. Justice Beverley.

NOOR ALI CHOWDHURI (JUDGMENT-DEBTOR) *v.* KONI MEAH AND OTHERS (DECREE-HOLDERS).* 1886 *March* 5.

Bengal Act VIII of 1869, *s.* 52—*Decree for rent, Execution of—Appellate Decree, Effect of—Liability to Ejectment.*

A decree under s. 52, Bengal Act VIII of 1869 (*a*) provided that unless the amount due was paid within 15 days from the date thereof, the tenant (judgment-debtor) would be liable to ejectment. That decree was confirmed in appeal, *no steps to execute it having been taken in the meantime.* The tenant paid the decretal amount into Court within 15 days of the appellate decree.

Held, that inasmuch as the appellate decree must be presumed to incorporate the terms of the original decree, and was the only decree of which execution could be taken, the tenant (judgment-debtor) having paid the decretal amount within 15 days of that decree was protected from ejectment.

THIS was a proceeding in execution. The decree which was one under s. 52 of the Rent Act (Bengal Act VIII of 1869) provided that unless the arrears of rent with costs and interest were paid within 15 days of the date thereof, the tenant should be liable to ejectment from his holding. It was confirmed in appeal some six months afterwards, and within 15 days of the appellate decree, the judgment-debtor deposited the necessary amount in Court. The decree-holder who had taken no steps to execute the original decree now made an application to be put in possession of the holding. The question arose whether the period of 15 days should be computed from the date of the original or the appellate decree. The Munsiff, referring to *Puresh Nath Ghose* v. *Kristo Lal Dutt* (1), decided the point in favour of the decree-holder, and granted the application. On appeal the District Judge confirmed the order of the lower Court. The judgment-debtor then appealed to the High Court.

Munshi *Serajul Islam* for the appellant.

* Appeal from order No. 103 of 1885, against the order of R. H. Greaves, Esq., Officiating Judge of Chittagong, dated the 5th of January 1885, affirming the order of Baboo Nritya Gopal Sarkar, Officiating Moonsiff of North Roojan, dated the 8th of March 1884.

(*a*) Section 66, Cl. 2, Bengal Act VIII of 1885.

(1) 23 W. R., 50.

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Mr. *C. Gregory* for the respondents.

The following was the judgment of the Court (McDONELL and BEVERLEY, JJ.)

In this case a decree for arrears of rent was passed against the appellant on the 27th December 1882, and coupled with it an order that if the arrears so decreed were not paid within 15 days from the date of the decree, the appellant should be liable to ejectment from his holding. Against this decree the appellant preferred an appeal which was dismissed on the 17th of July 1883, and within 15 days from that date the appellant paid into Court the amount of the arrears decreed; no execution of the original decree having been taken out in the meantime.

The sole question that arises now is whether the appellant, not having paid the arrears within 15 days from the date of the original decree, is still liable to ejectment under the terms of that decree, notwithstanding the fact that the arrears were paid within 15 days from the date of the decree in appeal.

Both the lower Courts have found against the appellant on this point; but after taking time to consider the question, we are of opinion that this finding ought not to be upheld.

In arriving at his decision the Munsiff has relied on the case of *Puresh Nath Ghose* v. *Kristo Lal Dutt* (1), but that decision, we think, does not conclude the point in question, and we are not aware of any other direct authority in the matter.

In the case cited there would seem to have been no appeal and consequently no appellate decree. According to the judgment, "the Munsiff had attempted to modify his decree in review; but it is now finally held that the order of the Munsiff granting the review was illegal, and it is finally declared that his proceedings in that respect were void. The original decree, therefore, as made by the Munsiff stands, and that is the decree which is now to be carried out." It is clear, therefore, that that decision has no applicability to the circumstances of the present case in which the question is whether the appellant is liable to ejectment notwithstanding that he paid up the arrears within 15 days from the date of the appellate decree.

(1) 23 W. R., 50.

We have been unable to find any express authority on the precise point now before us, but we think that there is direct authority, not only in reported cases, but in the Code of Civil Procedure itself, for holding that the appellate decree, even where the appeal is merely dismissed, supersedes the original decree, and is the only decree that can be executed if execution has not already been had upon the original decree.

In the Full Bench case of *Luchman Persad Singh* v. *Kishen Persad Singh* (1), it was decided that even though the appellate decree did nothing more than confirm the decree of the lower Court, it was the paramount decision in the case, and that execution should be taken out of that appellate decree and not of the decree which it confirmed; and the question of limitation which was in issue in that case was decided upon this ground.

In the case of *Kristo Kinkur Roy* v. *Raja Baroda Kant Roy* (2), decided by the Privy Council in 1872, the following observations occur: "The state of the Indian authorities upon the general question seems to be this. In the case before us the High Court obviously proceeded upon the principle that a simple decree of affirmance did not so incorporate the mandatory part of the original decree as to make for all purposes the decree of the Appellate Court the sole decree to be executed. And this ruling appears to have been followed in the case of *Chowdhry Wahed Ali* v. *Mullick Inayet Ali* (3), in which it was ruled that in order to make the decree of the Appellate Court the final decree in the suit for all the purposes of execution, it was necessary that it should have decreed a material modification of the original decree. The rule so expressed seems open to the objection of vagueness. The Full Bench of the High Court of Bengal, however, in *Ram Charan Bysack* v. *Lakhi Kant Bunnik* (4), has ruled that whether the decree of the lower Court is reversed or modified or affirmed, the decree passed by the Appellate Court is the final decree in the suit; and in the words of Mr. Justice Mitter 'as such the only decree which is capable of being enforced by execution.' And that is in accordance with the Madras decision in *Aruna Chella Thudayan* v.

(1) I. L. R. 8 Calc., 218.
(2) 14 Moore's I. A., 465; 10 B. L. R., 101.
(3) 6 B. L. R., 52.
(4) 7 B. L. R. 704; 16 W. R. F. B., 1.

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Veludayan (1). Chief Justice Scotland's words are: 'Whether that decree be in affirmance or reversal or modification of the decree appealed from, it becomes the final decree in the suit, and therefore the decree enforceable by execution.'"

Section 579 of the Code provides that the decree of the Appellate Court "shall specify clearly the relief granted or other determination of the appeal," and "shall also state the amount of costs incurred in the appeal and by what parties and in what proportions such costs, *and the costs in the suit*, are to be paid." We think that these words clearly show that the appellate decree is intended to supersede the original decree. Then s. 583 goes on to say: "When a party entitled to any benefit (by way of restitution or otherwise) under a decree passed in an appeal under this Chapter desires to obtain execution of the same, he shall apply to the Court which passed the decree against which the appeal was preferred; and such Court shall *proceed to execute the decree passed in appeal* according to the rules hereinbefore prescribed for the execution, of decrees in suits."

It seems to us clear, therefore, that the decree, and the only decree, of which execution could be taken out was the appellate decree. That decree must be presumed to have incorporated the terms of the original decree, and if the arrears were paid within 15 days from its date the appellant was not liable to be ejected.

The words of s. 52 of Bengal Act VIII of 1869 are: "In all cases of such suits for the ejectment of a rayat or the cancelment of a lease the decree shall specify the amount of the arrear, and if such amount, together with interest and costs of suit, be paid into Court within 15 days from the date of the decree, execution shall be stayed."

It was of course open to the decree-holder to take out execution of the original decree at any time before it was superseded by the decree in appeal. Not having done so, we are unable to see that he has any real grievance because the terms of the appellate decree have been complied with by the appellant.

The order of the lower Appellate Court is accordingly reversed and the appellant is declared to be not liable to ejectment. The appellant will also have his costs in all the Courts.

K. M. C. *Appeal allowed.*

(1) 4 Mad. H. C., 215.

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THE plaintiff in this case alleged that the defendant was in occupation of two plots of land under a *kursa-jama* or ordinary *ryati-jama* from which he, as tenant thereof, could be ejected at will; that while in such occupation he had built huts upon the land and had committed various other acts of encroachment inconsistent with the rights of a tenant holding a *kursa-jama*; that moreover the defendant, in a previous suit No. 23 of 1878, had put in a written statement setting up as against him (the plaintiff) a permanent *malguzari jama*, including therein the two disputed plots, and alleged that such *jama* had been in possession of him and his predecessors from a time previous to the Permanent Settlement (but that most of the documents put in to support the defendant's statement had been proved to be forgeries); that he had served on the defendant, on the 1st October 1881, a notice calling upon him to quit by the 14th November 1881.

On these allegations the plaintiff on 8th August 1882 brought this suit, praying (1) that the defendant's allegation of a permanent *malguzari jama* might be set aside; (2) that the defendant might be ejected from the two plots of land, and that he, the plaintiff, might be put into possession thereof.

The defendant admitted the notice to quit, but objected that it was an unreasonable one, and stated that his predecessors, and subsequently he himself, had possessed and enjoyed the disputed lands in right of a permanent fixed *malguzari jama* and claimed a right of occupancy therein.

The Subordinate Judge amongst others fixed the following issues: (1) Is the notice good? (2) Whether the disputed land was the permanent *malguzari* right alleged by the defendant? (3) Whether or not the defendant had a right of occupancy? And in determining these issues held, that the defendant was entitled to a six months' notice expiring at the end of the year, this being in his opinion a reasonable notice; that the defendant not having been served with such a notice, the plaintiff was not entitled to a decree for possession; that the defendant had no permanent *malguzari jama* in the disputed lands, and that he had no right of

occupancy therein; he therefore gave the plaintiff a decree declaring that the defendant was a tenant from year to year liable to be ejected by a six months' notice to quit expiring at the end of the year.

The defendant appealed to the District Judge, and the plaintiff cross-appealed as to the question of notice.

The District Judge held that the notice to quit was not a reasonable one, on the ground "that it was utterly unreasonable to ask the defendant to give up in a month and twenty-four days land which he had held for so long a time, and which with permission of the plaintiff's agents he had covered with buildings," and set aside the declaratory decree made by the lower Court, on the ground that a suit would not lie to set aside an allegation, holding that even if such suit would lie, this was not a case in which a Court in exercising its discretion should grant such relief.

The plaintiff appealed to the High Court.

Mr. *Woodroffe* (with him Baboo *Kali Mohun Das* and Baboo *Durga Mohun Das*) for the appellant contended that no notice to quit was necessary as the defendant has repudiated the true position of his landlord, setting up a larger interest than he was entitled to, *viz.*, a permanent *malguzari jama*, he being entitled merely to a *kursa-jama*—*Vivian* v. *Moat* (1), *Baba* v. *Vishvanath Joshi* (2); and further contended that a declaratory decree could be made in the case—*Nilmony Singh* v. *Kally Churn Bhattacharjee* (3), and *Kathama Natchiar* v. *Dora Singa Tevar* (4); and that the District Judge was not justified in interfering with the discretion exercised by the lower Court granting such relief, no reasons having been given in his judgment for so doing.

Mr. *Bell* (with him the *Advocate General* (Mr. *Paul*), and Baboo *Rash Behari Ghose*) for the respondent.

Mr. *Bell*.—The notice being insufficient, the case ought to have been dismissed without any decision on the other issues. *See* Field's Rent Digest, Article 89, p. 62, and *Bissesuri Dabeea* v. *Baroda Kant*

(1) L. R., 16 Ch. D, 730.
(2) I. L. R., 8 Bom., 228.
(3) L. R. 2 I. A., 83; 14 B. L. R., 382.
(4) L. R. 2 I. A., 169; 15 B. L. R., 83.

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Roy Chowdry (1). A declaratory decree to set aside an allegation will not lie—*Nilmony Singh* v. *Kully Churn Bhattacharjee* (2), *Kathama Natchiar* v. *Dora Singa Tevar* (3), *Sreenarain Mitter* v. *Kishen Soondery Dassee* (4), *Sheo Singh Rai* v. *Dakho* (5).

The judgment of the Court (FIELD and MACPHERSON, JJ.) was delivered by

FIELD, J., who after setting out the facts continued.—The first point pressed upon us in appeal is that no notice was necessary, because the defendant being entitled merely to *kursa-jama* had set up a larger interest in himself, *viz.*, a permanent *malguzari jama*, had repudiated the true position of his landlord, and might therefore be ejected at once without notice. In support of this contention the case of *Vivian* v. *Moat* (6) was relied upon. In that case the tenant defendant had disputed his landlord's right to raise the rent. Fry, J., said: "Every landlord, in the ordinary sense of the word, has in popular language a right to raise the rent," and he considered that the denial of the landlord's right to raise the rent being a suggestion that the landlord was not an ordinary landlord of the estate, but either a lord of the manor or an owner of some other right which gave him a title to a customary rent merely, was in fact a renunciation or disclaimer of the landlord's title. We think that the ground of this decision rests mainly upon the relation of landlord and tenant, as it exists in England, where such relation depends upon contract, and that the principle of this case is not applicable to this country, where a different state of things prevails. In this country there are numerous tenures the rent of which cannot be raised, and the denial of the landlord's right to raise the rent is not necessarily a renunciation or disclaimer of his title as landlord.

The next question argued before us is concerned with the reasonableness of the notice. Whether a notice is or is not reasonable is a question of fact, and therefore ordinarily the decision of this question is not open to second appeal. But if the finding of the Court below is based upon no evidence, or

(1) I. L. R., 10 Calc., 1076.
(2) L. R. 2 I. A., 83; 14 B. L. R., 382.
(3) L. R. 2 I. A., 169; 15 B. L. R., 83.
(4) 11 B. L. R., 171.
(5) I. L. R. 1 All., 688.
(6) L. R. 16 Ch. D., 730.

upon reasons, all of which are untenable, no doubt the propriety of such finding might be questioned upon second appeal. The Judge in the Court of first instance thought the notice unreasonable, because it did not expire at the end of the year, and further, because it was not a six months' notice which he thought would under the circumstances be a reasonable notice. The first ground is absolutely untenable. There is no law in this country which requires a notice to quit in a case of this kind to expire at the end of the year. The second ground is also bad, because there is no law which requires a six months' notice to be given. What the Judge ought to have found was, not what notice would have been reasonable, but whether the notice actually given in this case was or was not reasonable. If the Judge in the lower Appellate Court had merely adopted the reasons given by the Subordinate Judge, it might fairly be contended that his finding was open to question in second appeal. We think, however, that although he has adopted the Subordinate Judge's finding, he has not adopted his reasons, but has exercised his own judgment upon the evidence in the case. He says at page 31: "The defendant urges that this notice is unreasonable, and the Subordinate Judge holds that it is so. So far I quite agree with the Subordinate Judge." Here he agrees in what the Subordinate Judge holds, but he does not express his concurrence in the reasons given by the Subordinate Judge for his finding; and from his observations at page 33 it appears that he did not concur in the view taken by the Subordinate Judge that there should be a six months' notice. At page 32 the District Judge says: "Under any circumstances it was utterly unreasonable to ask defendant to give up in a month and twenty-four days land which he had held for so long, and which with the permission of plaintiff's agents he had covered with buildings." We think that this is a finding of fact that the notice of one month and twenty-four days given to the defendant was not a reasonable notice. The District Judge then proceeds to give his reasons, and it has been pressed upon us that in giving these reasons he has omitted to consider many facts and circumstances in the case which should have weighed with him in forming his opinion upon the question which he had to decide. It may

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be quite possible that the Judge has not dealt with this question as fully and satisfactorily as could be wished; but nevertheless we are of opinion that we cannot enter upon an examination of the evidence upon second appeal, and that we are precluded from interfering with the finding of fact arrived at by the Judge.

The next question with which we have to deal resolves itself into two parts: *first*, was the District Judge right in thinking that no declaratory decree could according to law be made in this case; and, *secondly*, was he justified in interfering with the exercise of discretion by the Court of first instance in making such a decree.

As to the first point we think that the Judge was in error in holding that a declaratory decree could not, according to law, be made in the present case. In the two cases in *Nilmony Singh* v. *Kally Churn Bhattacharjee* (1) and *Kathama Natchiar* v. *Dora Singa Tevar* (2), their Lordships of the Privy Council deal with the provisions of s. 15 of Act VIII of 1859. This section has been repealed, and the provisions of the present law, s. 42 of the Specific Relief Act, are materially different. The provisions of s. 42 are as follows: "Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief." Now, what the plaintiff asks in this case is that the defendant's declaration as to having a permanent *malguzari jama* be set aside. We must not in this country tie up parties too strictly to the language of their pleadings, and we must look, not at this language merely, but at the substance of the thing. The plaintiff admits that the defendant has a *kursa-jama*, but he denies that the defendant has the much larger interest asserted by him, *viz.*, a permanent *malguzari jama*. In other words, he alleges that the interest which is vested in himself is the whole proprietary right less a *kursa-jama* belonging to the defendant, and that it is not a much smaller interest, *viz.*, the proprietary right less a permanent

(1) L. R. 2 I. A., 83; 14 B. L. R., 382. (2) L. R. 2 I. A., 169; 15 B. L. R., 83.

protected tenure, that is, a permanent *malguzari jama*. Let us now see what the pleadings were. In the sixth paragraph of his written statement the defendant alleged that for more than twelve years before the service of the notice, he and his predecessor had been possessing and enjoying the disputed lands in right of a permanent fixed *malguzari jama*, and exercising the aforesaid permanent *malguzari* right over the same; and in the nineteenth paragraph he alleged as follows: "From before the Decennial Settlement, from the time of the plaintiff's predecessors, I have been from the time of my forefathers enjoying and possessing the disputed lands together with some other lands of mouzah Ghatakhal and Turbhunaia at a rent formerly of Sicca Rs. 7-12-4-1-2 kag, and then of Company's Rs. 8-4-6 pie as permanent *mokurrari* transferable *malguzari jama* held and possessed from generation to generation, first by clearing the jungles and preparing gardens on the same, and then by settling tenants here and there from time to time, and preparing gardens and excavating tanks, &c., on the same. My right of occupancy is of course involved in that superior right of mine." The Subordinate Judge fixed among other issues the following, namely, the tenth, "whether or not the disputed land is the permanent right alleged by the defendant in the nineteenth paragraph of his written statement," and the fifteenth, "whether or not the defendant has a right of occupancy in the land." Finding these two issues against the defendant, he made a declaration that the defendant has no permanent or protected holding in the land, not even a right of occupancy; that he is a tenant from year to year, and is liable under the circumstances to be ejected on a six months' notice to quit expiring at the end of the year. Now, there can be no doubt that this declaration is too wide, and that so far as regards the statement that the defendant is a tenant from year to year, and is liable under the circumstances to be ejected on a six months' notice to quit, expiring at the end of the year, it should not have been made. But it is contended that the plaintiff is entitled to a declaration upon the finding upon the tenth and fifteenth issues, that the defendant is not entitled to such a permanent

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right as that alleged in the nineteenth paragraph of his written statement, and that he has not a right of occupancy in the land. It appears to us that as a matter of law such a declaration can be made under the provisions of s. 42 of the Specific Relief Act. This view is in conformity with the case of *Rajundur Kishwar Sing* v. *Sheopursun Misser* (1), see the remarks of their Lordships of the Privy Council at pages 449 and 450. This case, it is to be observed, was decided before s. 15 of Act VIII of 1859 was enacted. Then the case of *Bissesuri Dabeea* v. *Baroda Kant Roy Chowdry* (2), decided after the passing of the Specific Relief Act, though not exactly in point, lends a certain support to the view which we take. It has been contended that, inasmuch as the plaintiff sued for ejectment, and the declaration which he asks for is merely ancillary to this ejectment, the declaration should not be made. This is no doubt a good argument, as regards that portion of the declaration made by the Court of first instance, which we have above intimated, cannot be sustained. It has also some force, as regards the portion of the declaration, based on the finding upon the fifteenth issue ; and as regards this issue we may further observe that the plaintiff has not asked that it be declared that the defendant has not a right of occupancy. It appears to us that the whole of the pleadings fairly construed show that the plaintiff sought two things: *first*, to have it declared that the defendant had not a permanent *malguzari* tenure, or, in other words, that the interest in him, the plaintiff, was the whole zemindari interest less a *kursa-jama* ; and *secondly*, to have the defendant evicted from this *kursa-jama* upon service of notice to quit. We think that these two things are separate, and that the plaintiff may well have the declaration which he asks for, even though in consequence of his failure to prove a reasonable notice he is unable to proceed to the ejectment of the defendant. Having regard to the proviso of s. 42, it may be observed that in respect of the interest as to which the plaintiff seeks a declaratory decree no further relief is possible, and that the further relief which would have been possible, if a proper notice had been served, is sought not in respect of the interest which

(1) 10 Moore's I. A., 438. (2) I. L. R., 10 Calc., 1076.

the plaintiff claims to have and which in substance he asks to have declared, but in respect of the interest which he admits the defendant to have, *viz.*, a *kursa-jama*. We think, therefore, that under the present law, s. 42 of the Specific Relief Act, (and see the illustrations to this section), such a decree as that which is now asked can be made. Then it is said that the plaintiff seeks merely to set aside an allegation. There can be no doubt that a declaratory decree ought not to be made to set aside a mere allegation; but in the present case the defendant's conduct amounts to something more. In the previous case, No. 23 of 1878, he set up this permanent *malguzari jama* and he produced documentary evidence to prove it. He is found to have since been exercising rights in the land inconsistent with a *kursa-jama* interest, though consistent with the permanent *malguzari jama* which he alleges, and in the present case he has repeated this allegation of a permanent *malguzari jama*, and has again brought forward documentary evidence to prove it (a large portion of which evidence has been found to be forged).

The next question with which we are concerned is that of discretion. The Judge in the Court of first instance in the exercise of his discretion made a declaratory decree. The District Judge set aside the decree, because in his view it cannot be made under the present law, and then at the end of his judgment he says: "Finally I must remark with special advertence to *Nilmony Singh* v. *Kally Churn Bhattacharjee* (1), that the granting of a declaratory decree is discretionary with the Court, and that even if there was no rule of law against making the declaration asked for by the plaintiff, this is not a case in which such relief should be granted." Now, if the second portion of this sentence be construed as referring to the case of *Nilmony Singh* v. *Kally Churn Bhattacharjee* (1), the reasons which may be assumed to have influenced the Judge have no existence, because that case was governed by s. 15 of Act VIII of 1859, which has no application in the present case, and the Lords of the Privy Council, after expressing their opinion at the bottom of page 85 that that was not

(1) L. R., 2 I. A., 83; 14 B. L. R., 382.

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a case in which, in the proper exercise of discretion, a declaration of title should be made, proceeded to state what the facts were; that the real object of the suit was to obtain a general declaration against a number of persons holding different rights. The facts of the present case are not analogous, and, therefore, the same reasons do not apply. If, on the other hand, the second part of the sentence above quoted is to be construed as having no reference to the case of *Nilmony Singh* v. *Kally Churn Bhattacharjee* (1), then the Judge reverses the exercise of discretion by the Court of first instance without assigning any reason for so doing, and such a judgment cannot stand. In the case of *Sreenarain Mitter* v. *Kishen Soondery Dassee* (2), their Lordships of the Privy Council said: "It is not a matter of absolute right to obtain a declaratory decree. It is discretionary to the Court to grant it or not, and in every case the Court must exercise a sound judgment as to whether it is reasonable or not under all the circumstances of the case to grant the relief prayed for." The Lords of the Privy Council heard that case as a second appeal, and putting themselves in the position of the High Court hearing a second appeal they made it a ground of their decision, that it would not be exercising a sound discretion, even if it could be done, to make the declaratory decree asked. In the case now before us the Judge has exercised no judgment, he has given no reasons for interfering with the exercise of discretion by the Court of first instance.

We must, therefore, set aside his reversal of the Subordinate Judge's exercise of discretion as to the granting of a declaratory decree, and the case must go back in order that the Judge, in the Court below, may determine the question of fact raised by the tenth issue. If this issue is found against the defendant and in favor of the plaintiff, the plaintiff will be entitled to a decree declaring that the defendant has not the rights put in issue thereby.

Case remanded.

T. A. P.

(1) L. R. 2 I. A., 83; 14 B. L. R. 382.
(2) 11 B. L. R., 171, at p. 190.